Hamit bin Matusin v Superintendent of Lands and Surveys & Anor

HIGH COURT (MIRI) — SUIT NO MR49 OF 1983
SULAIMAN DAUD JC
22 MARCH 2001

Native Law and Custom *— Land dispute — Customary rights over land — Whether plaintiffs acquired customary rights over lands — Whether lands within river bank reserve disentitling plaintiffs from acquiring customary rights over lands*

The plaintiffs brought an action against the defendants seeking, inter alia, a declaration that at all material times to this action, the plaintiffs had acquired customary rights over their plot situated at Kampung Dagang, Miri, Sarawak ('the lands'). In a previous trial, the judge adjudged and declared that each of the plaintiffs had at all times material to the suits acquired customary rights over that plot in respect of which the declaration was sought and was entitled to use and occupy the same. However, on appeal by the defendants, the Supreme Court set aside the judgment and ordered a retrial. The issues for determination were: (i) whether the plaintiffs' houses were in the river bank reserve, thus disentitling the plaintiffs from claiming customary rights; (ii) the period when such determination was to be made, ie at the time when the native customary rights were alleged to have been first acquired by the plaintiffs; and (iii) the burden of proving that the lands were within the river bank reserve.

Held, judgment for the plaintiffs whose lands were not within the river bank reserve:

(1) Pursuant to s 5 of the Sarawak Land Code (Cap 81) ('the Code'), native customary rights can only be first created or acquired, other than acquisition, by way of transfer, gift or occupation, on or before 1 January 1958. The first relevant period whether or not the lands were within the river bank reserve is on or before 1 January 1958 (see p 541E, G).

(2) Pursuant to s 10(2) of the Code, no native customary rights are capable of being acquired if the lands were within the river bank reserve before 1 January 1958. Similarly where native customary rights have been acquired and if, after its acquisition, it becomes a river bank reserve such right shall cease to subsist. The defendants can also succeed in their defence if they can prove that the lands were or are within the river bank reserve at any time on or before 1 January 1958 or if native customary rights have been acquired, at any period of time after such acquisition (see pp 541I–542A).

(3) The onus is on the defendants to satisfy the court that the lands were within a river bank reserve when the native customary

rights were first acquired on or before 1 January 1958 or at any time thereafter, as he who alleges must prove the allegation (see p 543B–C).

(4) From an analysis of the evidence, several houses were outside the river bank reserve and several houses were within the river bank reserve. Accordingly, the applications wherein the houses were within the river bank reserve were dismissed with costs and judgment was entered for the plaintiffs whose houses were not within the river bank reserve together with costs and damages to be assessed by the senior assistant registrar (see p 548B–E).

[**Bahasa Malaysia summary**

Plaintif-plaintif telah memulakan satu tindakan terhadap defendan-defendan memohon, antara lain, satu deklarasi bahawa pada setiap masa matan tindakan ini, plaintif-plaintif telah memperoleh hak-hak adat atas plot mereka yang terletak di Kampung Dagang, Miri, Sarawak ('tanah-tanah tersebut'). Di dalam perbicaraan terdahulu, hakim telah memutus dan mengisytiharkan bahawa setiap daripada plaintif-plaintif tersebut telah pada setiap masa matan terhadap guaman-guaman tersebut memperoleh hak-hak adat ke atas plot tersebut berhubung dengan deklarasi yang dipohon dan berhak untuk mengguna dan mendiami yang sama. Namun begitu, atas rayuan defendan-defendan, Mahkamah Agung telah mengetepikan penghakiman tersebut dan memerintahkan satu perbicaraan semula. Persoalan-persoalan untuk ditentukan adalah: (i) sama ada rumah-rumah plaintif-plaintif berada di tebing sungai simpanan, oleh itu melucutkan hak plaintif-plaintif daripada menuntut hak-hak adat; (ii) tempoh bila penentuan sedemikian patut dibuat, iaitu pada masa apabila hak-hak adat anak watan didakwa telah pertama sekali diperolehi oleh plaintif-plaintif; dan (iii) beban membuktikan bahawa tanah-tanah tersebut di dalam kawasan tebing sungai simpanan tersebut.

Diputuskan, penghakiman untuk plaintif-plaintif yang mana tanah-tanah tersebut bukan dalam kawasan tebing sungai simpanan tersebut:

(1) Menurut s 5 Kanun Tanah Sarawak (Bab 81) ('Kanun tersebut'), hak-hak adat anak watan hanya boleh dibentuk atau diperolehi terlebih dahulu, selain daripada perolehan, melalui pindahmilik, hadiah atau penempatan, pada atau sebelum 1 Januari 1958. Tempoh pertama yang berkaitan sama ada atau tidak tanah-tanah tersebut dalam kawasan tebing sungai simpanan tersebut adalah pada atau sebelum 1 Januari 1958 (lihat ms 541E, G).

(2) Menurut s 10(2) Kanun tersebut, tiada hak-hak adat anak watan yang boleh diperolehi jika tanah-tanah tersebut di dalam kawasan

tebing sungai simpanan tersebut sebelum 1 Januari 1958. Begitu juga di mana hak-hak adat anak watan tersebut telah diperolehi dan jika, setelah perolehannya, ia menjadi satu tebing sungai simpanan hak tersebut hendaklah tidak lagi wujud. Defendan-defendan juga boleh berjaya dalam pembelaan mereka jika mereka boleh membuktikan bahawa tanah-tanah tersebut adalah atau dalam kawasan tebing sungai simpanan tersebut pada bila-bila masa pada atau sebelum 1 Januari 1958 atau jika hak-hak adat anak watan tersebut telah diperolehi, pada bila-bila masa pada atau sebelum 1 Januari 1958 atau jika hak-hak adat anak watan tersebut telah diperolehi, pada bila-bila tempoh masa selepas perolehan tersebut (lihat ms 541I–542A).

(3) Beban terletak atas defendan-defendan untuk memuaskan mahkamah bahawa tanah-tanah tersebut di dalam kawasan tebing sungai simpanan semasa hak-hak adat anak watan tersebut pertama kali diperolehi pada atau sebelum 1 Januari 1958 atau pada bila-bila masa selepas itu, kerana sesiapa yang mengatakan begitu mestilah membuktikan pengataan tersebut (lihat ms 543B–C).

(4) Daripada satu analisa keterangan, beberapa rumah berada di luar kawasan tebing sungai simpanan dan beberapa rumah berada di dalam kawasan tebing sungai simpanan tersebut. Sewajarnya, permohonan-permohonan di mana rumah-rumah tersebut berada di dalam kawasan tebing sungai simpanan tersebut telah ditolak dengan kos dan penghakiman telah dimasuki untuk plaintif-plaintif yang mana rumah-rumah tersebut tidak berada di dalam kawasan tebing sungai simpanan bersama dengan kos dan ganti rugi yang perlu ditaksir oleh penolong kanan pendaftar (lihat ms 548B–E).]

Notes

For cases on customary rights over land, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 620–623.

Cases referred to

Juahir Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johore [1996] 3 MLJ 627 (refd)

Ng Kim Huat v PP [1961] MLJ 308 (refd)

Legislation referred to

Land (Classification) Ordinance 1948 s 5(3)(a)

Land (River and Road Reserve Alienation) Directions 1983

Land Code (Cap 81) ss 2, 5, 10(2), 38(1)

Land Ordinance (Cap 27) s 6

MS Sandhu (*MS Sandhu & Co*) for the plaintiff. A

Abdul Razak Tready (Deputy State Attorney General) for the defendants.

Sulaiman Daud JC:. By writs issued at various dates, each of the plaintiffs in these seven consolidated suits brought an action against the Superintendent of Lands and Surveys, Fourth Division and the Government of Sarawak seeking, among others, a declaration that at all B material times to this action, the plaintiffs have acquired customary rights over their plot situated at Kampung Dagang, Miri, Sarawak as more particularly shown and described in annexure A ('the said lands') to the respective statements of claim and that the plaintiff was entitled to use and occupy the same.

C

At the outset, it is necessary to briefly state the facts of the case and the background of this hearing. On 13 March 1991, the learned judge who heard this action ('the previous trial') adjudged and declared, after a full trial, that each of the plaintiffs had, at all times material to the suits, acquired customary rights over that plot in respect of which the declaration was sought and was entitled to use and occupy the same. However, on D 21 July 1994 the Supreme Court, on appeal by the defendants, set aside the said judgment and ordered a retrial of all the consolidated cases before another judge. The case was subsequently heard before another judge and on 17 May 1995 at one of such hearings the parties, through their respective counsel, came to an agreement that the only issue for determination at the E retrial was whether the plaintiff's houses were in the river bank reserve. With regard to the evidence adduced at the previous trial, it was also agreed between both parties that such evidence be incorporated as part of the evidence of this fresh trial, subject to the condition that each party shall be at liberty to adduce any further evidence in relation thereto. The parties further agreed that all other findings of fact and law in the previous trial shall F be binding upon the parties so far as they are relevant. On the mode of trial, it was agreed that the plaintiff would first adduce evidence that the houses were not in the river bank reserve which will then be rebutted by the defence.

In the amended defence dated 5 August 1995, the defendant made the G necessary amendment to the defence to plead the point in issue, in particular to para 3 and 8 thereof. The amended para 3 and 8, with the relevant amendment shown in italics, read as follows:

> 3 The first and second defendants admit the allegations contained in para 3.1, 3.2, and 3.3 of the statement of claim save that in para 3.1 H thereof, the defendants deny that the said plots of land belonged to the plaintiffs as alleged. *The first and second defendants further say that the said plots of land were within the River Bank Reserve as provided under s 38 of the Land Code (Cap 81)*; and
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> 8 The first and second defendants admit the allegations contained in para 8 of the statement of claim but deny that the plaintiffs had any customary I right therein and aver that the extinguishments of the same was not necessary in the circumstances. *The first and second defendants repeat para 3 hereof.*

Finding of facts and law in the previous trial

Since both parties have agreed to be bound by all other findings of fact and law in the previous trial it is necessary for me at this stage to determine what such findings were. In the previous trial, the learned judge in considering the claim of the plaintiffs have considered two central issues, firstly whether the plaintiffs have acquired native customary rights over the lands on which their houses were situated and secondly, if answered in the positive, whether the plaintiffs were permitted by their native custom to part with (the land and the houses) or transfer them to others within the same community.

With regard to the first issue, it is clear to me from the judgment of the previous trial that the learned judge held that the plaintiffs had acquired native customary rights over the said land on the following ground:

(a) That the plaintiffs have met the basic qualification to claim native customary rights.

(b) From the memorandum of surrender of customary rights to the state No 204/1978 (see pp 17–19 in exh P2) made by one of the plaintiff, there would appear to be implicit recognition of native customary rights over those lands by the defendants.

(c) That there was unchallenged evidence of the plaintiffs that they have acquired native customary rights claimed over those lands prior to 1 January 1958 by occupation of buildings or houses.

(d) That the plaintiffs have, by way of oral and documentary evidence, clearly showed that the native customary rights in those lands were properly acquired by them either by way of a gift or transfer or occupation.

(e) That the plaintiffs were in occupation of the houses on the said land before they were demolished.

It is also clear from the said judgment that the learned judge totally disregarded all evidence adduced by the parties relating to the issue on the river bank reserve on the ground that they were not pleaded. It is on this ground that the Supreme Court made the order of retrial. With regard to the second issue abovementioned, the learned judge held that the native customary rights over the land at Kampung Dagang can be transferred for value to members of the same community, and that the renting of the houses to non-natives would not adversely effect or extinguish the plaintiffs' native customary rights over the said lands.

The question as to whether or not the plaintiffs' plots were within the river bank reserve is, in my opinion, directly related to the issues on the acquisition of native customary rights by the plaintiffs. It is clear that the defendants in their amended defence denied the acquisition of any native customary rights by the plaintiffs by virtue of s 38 of the Land Code (Cap 81) ('the Code'). The said s 38, in so far as relevant, provides as follows:

> Save where express provisions is made to the contrary in any document of title by any general or special direction of the Minister, all unalienated land situate

within the limits stated below shall be reserved to the Government, and no one may acquire a title to the same or any part thereof:

(a) all land adjoining the sea coast within sixty-six feet of mean high water mark;

(b) all land within sixty-six feet on each side along the banks of all navigable rivers, stream, canals or creeks:

Prior to the date of coming into force of the Code on 1 January 1958, a substantially similar provision was provided in s 6 of the repealed Land Ordinance (Cap 27) prohibiting the acquisition of titles in respect of all unalienated land situate within the limit of 66 feet of high water mark or within 66 feet on each side along the banks of all navigable rivers. Be that as it may, before I proceed to determine the central issue as to whether the said lands are within the river bank reserve two related questions have to be answered firstly. The first question relates to the period when such determination is to be made and secondly on the burden of proving the same.

Period of time when determination is to be made

The plaintiffs in their respective reply to the defence dated 19 September 1995 pleaded, among others, as follows:

2A The plaintiffs do not admit that the said plots of land were within the River Bank Reserve as provided under s 38 of the Land Code (Cap 81) as alleged in para 3 of the amended defence or at all.

2B The plaintiffs will rely on the Land (Classification) Ordinance, 1948, as amended by the Land (Classification) (Amendment) Ordinance 1954, and aver that the onus is upon the defendants to establish that the said plots of land were situated within the River Bank Reserve prior to 22 April 1954.

From the pleadings as set out above, it is the plaintiffs' case that the relevant period for determining the central issues was on or before 24 April 1954. However, during submissions before me, the learned counsel contended that the relevant date for such determination was 4 May 1983, being the date when the plaintiffs houses over the said land were demolished. On the other hand the defendants in their defence merely pleaded that the said plots were within the river bank reserve by reason of which no native customary rights may be acquired or created. But during submissions, the learned Deputy State Attorney General, for the defendants, submitted that the relevant date to determine whether or not such land was within the river bank reserve was the date when the plaintiff acquired such customary rights. With regard to the acquisition of the native customary rights, the learned judge at the previous trial, without considering the evidence on the defence of river bank reserve, in holding that the plaintiffs have acquired native customary rights over the said land stated as follows:

It is not disputed that the plaintiffs by way of oral and documentary evidence clearly showed that the native customary rights in the houses were properly acquired by them either by way of gifts, transfer or occupation. We have

evidence of the plaintiffs paying rates to the Miri District Council (see pp 49–54 of exhs P1) or effecting repairs or renting them out to others until their houses were demolished.

Upon examining the pleadings of both parties and the findings of the judge at the previous trial, in my view, the question as to whether or not the plaintiffs' plots were within the river bank reserve should be determined at two points of time, firstly at the time when the native customary rights were alleged to have been first acquired by the plaintiffs or, in the case where such right was acquired by way of gift or transfer or occupation, by the persons from whom the plaintiffs acquired such right; and secondly, if such right were so acquired, such determination (whether such lands were within the river bank reserve) may be made at any time after such acquisition.

Section 5 of the Code provides that as from 1 January 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified in sub-s (2) thereof, but no recognition shall be given to any native customary rights over any land in Sarawak created after 1 January 1958. However, if such land is a mixed zone land and has been declared under s 5(3) of the Land (Classification) Ordinance 1948 ('the 1948 Ordinance') to be native area land, no such native customary rights may by virtue of para (a) thereof be acquired over such land on or after 21 May 1954, being the day the said para (a) came into force.

Based on the aforesaid provisions, native customary rights can only be first created or acquired, other than acquisition by way of transfer, gift or occupation, on or before 1 January 1958 or, in the case of a mixed zone land which has been declared to be native area land before 1 January 1958, on or before it was so declared. In the instant case, during submissions the learned Deputy State Attorney General furnished evidence by way of Sarawak Government Gazette dated 2 November 1956 that the area where the said land is situated had been declared to be a native area land with effect from the date of the Gazette. However in the absence of any evidence to show that such land was mixed zone land before it was declared to be native area land, I ruled that s 5(3)(a) of the 1948 Ordinance shall not apply. In my view, the first relevant period to determine whether or not the said lands were within the river bank reserve is on or before the 1 January 1958. However if I am wrong in so deciding that s 5(3)(a) of the 1948 Ordinance does not apply, then such relevant period shall be on or before 2 November 1956.

With regard to the second relevant period for making such determination, it is clearly provided in s 10(2) of the Code that no person may occupy any native customary land or any reserved land save under and in accordance with the conditions applicable thereto by virtue of this or any other written law. All land within 66 feet on each side along the banks of all navigable rivers and streams fall within the definition of reserve land in s 2 of the Code. In other words no native customary rights are capable of being acquired if the said land were within the river bank reserve before 1 January 1958. Similarly, where native customary rights have been acquired and if,

after its acquisition, it becomes a river bank reserve, such right shall cease to subsist. By reason thereof I am of the view that the defendants can also succeed in their defence if they can prove that the said lands were or are within the river bank reserve at any time on or before 1 January 1958, or if native customary rights have been acquired, at any period of time after such acquisition. It is to be noted that it was also the finding of the learned judge at the previous trial that native customary rights over the said lands at Kampung Dagang can be transferred for value to members of the same community. With regard to the acquisition of the native customary rights, there was no evidence adduced by both parties when such rights were first acquired.

Having ascertained the relevant period for determining the issue on the river bank reserve, the further question to be answered is on whom lies the burden of proof that the said lands were within the river bank reserve on or during the two relevant periods as aforesaid.

Burden of proof that the said lands were within the river bank reserve

On the burden of proof, the learned counsel for the plaintiff submitted that such burden lies on the defendants. He pointed out that the defendants in the amended defence asserted that the said plots were within the river bank reserve as provided under s 38 of the Code and therefore were liable to be removed by order of the minister without compensation. By asserting such defence, the learned counsel argued that the defendants must bear the onus of proof in respect thereof based on the principle that 'he who asserts must prove'. In support of the said principle, he cited several authorities, one of which was the decision of the Court of Appeal in *Juahir Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johore* [1996] 3 MLJ 627. In that case, the appellant exercised his option to purchase out of time a unit of low cost house built by the respondent. However, the respondent waived the breach and offered to sell such unit for RM14,000, but the offer was rejected by the appellant. He asserted that there was an oral representation by Tan Sri Bashir, the director of the respondent, to sell the said unit at a price between RM7,000 to RM8,000. On the onus of proof in respect of the representation, his lordship Mokhtar Sidin JCA stated at p 13:

> It is clear that it was the plaintiff who asserts that Tan Sri Dato' Haji Bashir who made the offer, the onus is on the plaintiff to satisfy the Court that such an offer was ever made. This is clearly provided by ss 101 and 103 of the Evidence Act 1950. The sections read as follows:
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> 101 Burden of proof
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> (1) Whoever desire any Court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that these facts exist;
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> (2) When the person is bound to prove the existence of any fact, it is said that the buden of proof lies on that person.
>
> 103 Burden of proof as to particular fact
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> The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact lies on any particular person.

A It is clear from the above provisions on whom the onus lies. In the present case it is the plaintiff who had asserted that there exists a particular fact viz that there was an offer to sell the said land at the price between RM7,000 to RM8,000. The onus is on the plaintiff to satisfy the Court there was such an offer.

B In the instant case, it is the defendants who asserted that the said plots were within the river bank reserve and by reason thereof no person may by virtue of s 38(1) of the Code acquire a title thereto. Applying the principle 'he who alleges must prove the allegation' as laid down in *Juahir Sadikon*'s case, I agree with the learned counsel for the plaintiffs that the onus is, thus, on the defendants to satisfy the court that the said plots were within a river bank C reserve when the native customary rights were first acquired on or before 1 January 1958 (or alternatively on or before 2 November 1956 if s 5(3)(a) of the 1948 Ordinance apply in respect thereof) or at any time thereafter.

Whether the said lands were within the river bank reserve

D The defendants' case

The defendants seek to prove that the said lands were within the river bank reserve by relying upon a physical survey under Job 210/79 tendered as exh D1 to offset the positions of the houses from the river bank represented by a black curve thereon, and upon a photogrammetric map produced from E aerial photographs taken in 1964 and tendered as exh D4. For such purpose, the defendants called three witnesses DW3, DW4 and DW5.

EVIDENCE OF DW3

F DW3, a staff surveyor of the Department of Lands and Surveys, testified that the survey in Kampung Dagang was conducted by way of physical survey of distance and angle bearing by Job Instruction No 210/69 (in actual fact No 210/79). According to DW3, the river bank would be identified by the edge of the vegetation before certain changes to the terrain of the land, but since there was no clear definition of the edge of the river bank in the said area, the river bank boundary had to be identified from the means high G water mark ('MHWM'). The MHWM used by DW3 for the purpose of carrying out such survey was adopted from a survey of high water marks carried out in 1964 by observation of a series of high water marks in the area for one week. The said MHWM was shown by the black curve in exh D1 ('the said black curve'). DW3 used the said black curve as the river bank H boundary to offset the position of the plaintiffs' houses. Based on such physical survey it was found that the plaintiffs' houses, except MDC No 70, were within the 66 foot river reserve.

The learned counsel for the plaintiffs submitted that all evidence relating to the survey conducted in 1964 to determine the MHWM including that part of exh D1 comprising the black curve representing the I MHWM should be excluded by the court on the grounds, among others, that no field data or records of the high water marks used to determine the MHWM or other documents relating thereto were produced and that

DW3's evidence on the record of the 1964 survey was contradictory. He further submitted that all the evidence given by DW3 as the 1964 survey of the MHWM was hearsay as DW3 himself was not personally involved in the survey. However upon perusal of the notes of proceedings of the previous trial, it is clear to me that this issue on admissibility has been dealt with thereat. The field book of the Survey Department for the material period was not tendered as evidence by the defendants' counsel on the undertaking given by the plaintiffs' counsel that he was not objecting to the admissibility of D1 but only disputes its accuracy. By reason thereof, I am of the view he is estopped from raising the same issues at this stage of the proceedings.

I will next deal with the alternative issue raised by the learned counsel with respect to the determination of the said MHWM. He contended that in the absence of any definition of MHWM in the Code and the method for its determination, it is necessary to look at the practise in other jurisdictions for guidance. For such a purpose, he referred the court to the *Law For Surveyors* (Chap 5) published by the New Zealand Institute of Surveyors where, at pp 1–2 in the appendix thereof, the method of determining the MHWM in so far as relevant are set out as follows:

> 1.1 the usual practise is to survey the practical boundary between the land and the sea, for example the foot of the cliff, toe of a bank, edge of vegetation, highest line of driftwood etc. This has the advantage of being a meaningful and recognizable boundary capable of quick definition rather than an imaginary line subject to continuous or even daily change. For the sake of conformity and in accordance with land transfer requirements this line as depicted on the survey plan is called the Mean High Water Mark, …
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> 1.8 If the owner is not prepared to accept a practical definition of the boundary (toe of the bank, edge of vegetation, etc) then the Education or Range-Ratio method as described in ss 4.0 and 5.0, or by setting up an automatic tide gauge for at least one month and correcting the result obtained to obtain the 19 year mean equivalent, using the procedure described the Range-Ratio method. The resulting height should be tied to suitable bench marks.

The basic requirements to be satisfied in determining the MHWM are set out in para 5 thereof and are as follows:

> 5.0 Requirements
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> 5.1 It is necessary to have access to tidal data from a reference station where an automatic tide gauge is in continuous operation and records for at least one half of a Metonic cycle (ie 9.3 years) have been analyzed.

The second requirement is a control station where an automatic tide gauge has been established at some time in the past for at least one lunar month or preferably six months from which tidal data is available and bench marks related to the tide gauge are recoverable.

The other text referred to is the *Survey Law in Canada* (1989) by the Canadian Council of Land Surveyors where, on the determination of MHWM, it was stated at p 179 as follows:

> … To correct Mean High Water elevations for local variations, surveyors have recommended that tidal observations should be made at the survey site and compared with simultaneous observations at nearby control stations where Mean High Water elevation is known. These observations, usually made with a graduated tide staff, generally span one or two consecutive high and low water cycles. Once a local Mean High Water elevation has been calculated, either a contour or the water line can be staked when that elevation is observed to occur on the tide staff.

In the instant case, the MHWM in D1 was based on tidal waters in the said area and therefore, in my view, the method adopted by other jurisdictions for the determination of MHWM as illustrated above can be used as a guide in determining the accuracy, correctness or propriety of the survey carried out in 1964 to determine the said MHWM. In the absence of any other authority or evidence to the contrary adduced by the defence, I tend to agree with the learned counsel for the plaintiffs that the survey carried out in 1964 to determine the MHWM was not carried out in accordance or in compliance with certain accepted practices such as the requirement to have a tidal data from a reference station when an automatic tidal gauge was in continuous operation, and data from a control station where automatic tide gauge has been established at some time in the past for at least one lunar month or preferably six months from which tidal data is available. By reason thereof, I am of the view that the accuracy, correctness or propriety of the 1964 survey to determine the MHWM used in offsetting the plaintiffs' houses are questionable.

DW4

The next witness to testify for the defendant on the river bank reserve is DW4, a staff surveyor with the Department of Lands and Surveys, Miri. According to DW4, three of the said houses were right on a river bank, three within the river bank reserve and the remaining house was outside the river bank reserve. However the measurement was taken from the nearest part of the house to the river bank which, in this case, was the black curve in D1. In view of my earlier finding as to the propriety, correctness and accuracy of the MHWM, as represented by the black curve in D1, I likewise hold that the survey work conducted by DW4 was not proper or accurate and cannot be used as a basis in determining whether or not the said lands were within the river bank reserve.

DW5

The defendant's other witness on the river bank issue is DW5, a photogrammetrist of the Department of Lands and Surveys. DW5 relied on the photogrammetric map (exh D4) produced from aerial photographs in 1964. As can be seen, the river bank reserve therein was also determined by digitizing exh D1 into the photographic map. When asked, he agreed that the river bank shown in exh D4 was taken from exh D1. He also agreed that the validity of his finding depends on the accuracy of the river bank shown in exh D1, that is the black curve representing the MHWM therein. For the

reason stated earlier, I am also of the view that the river bank as shown in exh D4 cannot be used as the basis in determining whether or not the said lands were at the material time within the river bank reserve.

I am also in agreement with the plaintiffs' counsel that s 36 and 83 of the Evidence Act 1956 shall not apply in respect of the accuracy of MHWM on D1. The said s 36 provides for the relevancy of statement of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of the Government. Section 83 provides for the accuracy of maps or plans made by the authority of the Government. For such a presumption to apply in the instant case, there must be proof of the existence of the survey map, plan or chart in respect of the survey carried out in 1964 to determine the MHWM. Such a requirement was stated by Thomson CJ (as he then was) in the case of *Ng Kim Huat v PP* [1961] MLJ 308 at p 309:

> It is surely elementary to observe that while a statutory presumption when it arises may operate in place of evidence and so reverse the onus of proof on any point the bare potential existence of such a presumption cannot of itself dispense with proof of any fact the existence of which is a condition precedent of the presumption arising.

As correctly pointed out by the learned counsel for the plaintiffs, there can be no presumption as to the accuracy of the black curve in exh D1, as representing the MHWM, unless the map, chart or plan showing the said MHWM from which the black curve in exh D1 was drawn is produced as evidence.

It is my finding that the 1964 survey in establishing the MHWM was not properly conducted and accurate. It therefore necessarily follows that all survey works using the black curve in exh D1 as the MHWM or the river bank boundary were also not properly conducted or accurate and cannot be used as a basis in determining whether or not the said lands were within the river bank reserve.

Plaintiffs' case

In determining whether or not the defendants have succeeded in discharging the burden of proof on the river bank issue, I have to evaluate the evidence led by both the plaintiffs and the defendants relating thereto. Five of the plaintiffs, namely PW1, PW3, PW5, PW6 and PW7, testified in cross examination that their houses were outside the 66 feet river bank reserve at the time their houses were removed or demolished in 1983. However, I have to weigh the evidence against other evidence especially those adduced by expert witnesses called by both the parties. The plaintiffs called PW10 and PW11 to prove that the said plots of lands were outside the river bank reserve in accordance with the agreed mode of trial aforesaid.

PW10

PW10, W J Apgar, was called by the plaintiffs to dispute the accuracy of the river bank based on the MHWM as represented by the black curve in exh

D1. He is an engineer by profession with experience in oceanography and has participated in coastline survey but had not conducted any survey on river or land. In preparing his report he relied, among others, on aerial photographs taken in 1964 (exh P9) and in 1977 (exh P10). According to PW10, the 1964 aerial photographs (exh P9) showed that the palm trees at the relevant area were about six to ten metres from the high water mark and the plaintiffs houses were all behind the tree line. Exhibit P11, which is an enlargement of a segment of exh P10, indicated that the shoreline was accreting. PW10 in his report in exh P4, and in his evidence concluded that the true shoreline as signified by high water mark was 19 to 23 metres from the tree line as shown in the 1964 aerial photograph (exh P9) and that all the houses in question were outside the river bank reserve in 1964. However, upon the evidence given by DW5 in respect of the report made by PW10, I agree with the submission of the learned counsel for the defendants that the methodology applied by PW10 in providing the composite map in exh P4 are erroneous and that the analysis as well as the conclusion reached in terms of the river bank reserve may not be accurate. By reason thereof, I cannot give any weight to the evidence and report prepared by PW10.

PW11

The evidence of PW11 was given before me. PW11 used and analyzed the aerial photographs for 1964 and 1977 and the tidal charts to locate the edge of dry land (tidal shorelines). He then plotted the edges of the dry land for both such periods and used such tidal shorelines to offset the river bank reserve. No substantial challenge was mounted by the defendants' counsel in the cross examination to the method used and the accuracy of the analysis. I am also satisfied with the explanation given by PW11 in respect of the methods used by him and his finding as contained in exh P20. From the analysis of the 1964 photograph, as in figure 4 of exh P20, PW11 found that houses No 4, 5, 6 and 7 were outside the river bank reserve while houses No 1, 2 and 3 were within the river bank reserve.

As I have formed the view that any native customary rights acquired in respect of any land shall cease or determine upon the land becoming a reserve land, the next step is to determine whether or not based on the totality of evidence before me any of the said lands and the houses built thereon have at any time on or before or after 1 January 1958 (or 2 November 1956, as the case may be) were located within the river bank reserve. In the instant case, even if the burden of proof lies on the defendants to prove the same, I am also not precluded from evaluating and looking at the evidence led by the plaintiffs in making my finding.

Apart from making submissions directly related to the river bank issue as earlier agreed between the parties, both the learned counsels for the plaintiffs and the defendants submitted on other ancillary and incidental issues. The learned counsel for the defendants sought to open up the issues on the acquisition of the native customary rights, which in my view was not related to the river bank issue. Likewise, the learned counsel for the

plaintiffs submitted that the defendants ought to be barred from raising the defence that the plots of land were within the river bank reserve based on the principle *allegans contraria non est audiendus*. He pointed out all the said lands have been alienated by the defendants to a third party under the Land (River and Road Reserve Alienation) Directions 1983 after the plaintiffs were removed therefrom. In view of the agreement reached between the parties to confine the rehearing on the river bank issue only, in my opinion they are estopped from raising these additional issues.

Based on all the evidence before me, including the report prepared by PW11 on his analysis of the aerial photographs taken in 1964 and 1977 and the relevant tidal charges, it is my finding that:

(a) Those plots of land as described in Annexure A to the statement of claim in respect of Suit No MR 49 of 1983, Suit No MR 52 of 1983 and Suit No MR 58 of 1983 were at a point of time after 1 January 1958 within the river bank reserve; and

(b) Those plots of land as described in Annexure A to the statement of claim in respect of Suit No MR 50 of 1983, Suit No MR 57 of 1983, Suit No MR 61 of 1983 and Suit No MR 76 of 1988 were at all material times outside the river bank reserve.

Accordingly, the applications in Suit No MR 49 of 1983, Suit No 52 of 1983 and Suit No MR 58 of 1983 are hereby dismissed with costs herein and the costs in the previous proceedings. I enter judgment in terms of prayer (1) and (2) of the amended writ and statement of claim in respect of Suit No MR 50 of 1983, Suit No MR 57 of 1983, Suit No MR 61 of 1983 and Suit No MR 76 of 1988 with costs herein and in the previous proceedings. Damages to be assessed by the learned senior assistant registrar at a date to be fixed.

Judgment for plaintiffs whose lands were not within the river bank reserve.

Reported by Moy Saw Han